No. 20,386

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHARLES CORNET and REX STIDHAM WINDOM, JR., Appellants, vs. UNITED STATES OF AMERICA, Appellee.	)

APPELLANTS' REPLY BRIEF

HARRY E. CLAIBORNE
and
ANNETTE R. QUINTANA
108 South Third Street
Las Vegas, Nevada
ATTORNEYS FOR APPELLANTS

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APPELLANT'S REPLY BRIEF

POINT ONE

THE CONVICTION OF THE DEFENDANTS FOR MAIL FRAUD VIOLATES THE TENTH AMENDMENT AND THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION BECAUSE THE DEFENDANTS DID NOT MAIL OR KNOWINGLY CAUSE TO BE MAILED, ANY MATTER FOR THE PURPOSE OF EXECUTING A FRAUDULENT SCHEME.

The Government's Answer Brief follows the procedure of dealing spearately with Appellants' specifications of error, rather than responding to the propositions

set forth in the Appellants' separate points of argument. Under this point, therefore, Appellants are specifically replying to the matter contained in Division 1 of the Government's argument (pages 3-4, Answer Brief) and Division 5 (pages 18-22, Answer Brief.)

In support of the action of the lower court in refusing to dismiss the Criminal Information as one showing on its face that no use of the mails occurred until after the fruition and completion of the alleged fraudulent scheme, the Government relies upon the charge in the Information that the victims of the alleged fraudulent scheme were Phillips Petroleum Company, Inc. and Allied Oklahoma Corporation. This charge, however, is limited to and directly contradicted by the allegations in the remainder of the Information, which specify that the object of the scheme was on or about March 12, 1964 to "order and receive three tires for a Lincoln Continental, of a value of approximately $150.00, and service to the automobile of a value of approximately $22.55, from an attendant at the Saveway 15, a Phillips 66 Gasoline Service Station, 929 Las Vegas Boulevard South, Las Vegas, Nevada." Toward the end of the Information, in paragraph 7, the Government charged that it was a part of the scheme that on or about March 18, 1964, the credit

card slips would be forwarded in the ordinary course of business by mail from Las Vegas, Nevada, to Phillips Petroleum Company, Inc., Kansas City, Missouri.

This allegation also, in the face of the limited nature of the fraudulent scheme charged, is not borne out by the description of the scheme charged, but is instead contradicted on the face of the Information.

In the case of Kann v. United States, 1944, 323 U.S. 88, 65 S. Ct. 148, 892 Ed 88, it was charged that the defendants intended to defraud Triumph Explosives, Inc., and its stockholders by diverting part of the profits of Triumph on Government contracts to a corporation known as Elk Mills Loading Corporation whereby Elk Mills would then distribute the profits in the form of salaries, dividends and bonuses, and that the defendants caused a check drawn on Elk Mills to be delivered by mail a check drawn by one Jackson on a Delaware trust company.

In Kann, from the language of the opinion, the indictment did not show on its face that the scheme had been completed before the mailing took place, as in the present case. There the dismissal of the case was based upon the proof at the trial, where it was established that when the check was cashed at the local bank, the defendants had received the moneys it was intended they should receive under the scheme, and subsequent

mailings of the checks were merely incidental and collateral to the fraudulent scheme and not a part of it.

In Kann, also, it was argued that the scheme was not complete until the checks had been cleared in the ordinary course of business, which would require mailing to and payment by the drawee bank, but this argument was rejected. The court pointed out that the scheme had reached fruition before any mailing, that it was immaterial to the defendants how the bank which paid or credited the check would collect from the drawee bank. The court distinguished cases where the mails are used as one step toward the receipt of the fruits of the fraud, or cases where the use of the mails is a means of concealment so that further frauds which are part of the scheme may be perpetrated, and pointed out that "The federal mail fraud statute does not purport to reach all frauds, but only those limited instances in which the use of the mails is a part of the execution of the fraud, leaving all other cases to be dealt with by appropriate state law."

The ultimate victims of the fraud in Kann were the Triumph corporation and its stockholders, but this fact did not serve to enlarge the fraudulent scheme or prolong its execution, which was completed as soon as the local bank cashed the Elk Mills checks.

That is the situation here. The Information shows on its face that the obtaining of the tires and servicing of the automobile was a mere local matter, wholly completed before any use of the mails occurred. The Information does not allege facts which show that anything further remained to be done in the execution of the scheme after the tires and service were obtained in Las Vegas, Nevada, it does not allege that the scheme encompassed any further acquisitions by fraud, or that any use of the mails was made in order to escape detection.

The scheme charged in the Information was completed once the tires and service had been obtained in Las Vegas, and this is not a "tacit assumption" of appellants -- it is manifestly described in the factual allegations of the Information.

The cases relied on by the Government: Adams v. United States, CA 5th, 1963, 312 F.2d 137, and Kloian v. United States, CA 5th, 1965, 349 F.2d 291, both involved fraudulent schemes encompassing more than a single transaction. In Adams, the Indictment alleged a scheme involving the mailing of "various sales slips" and the proof was that the defendant used the credit card for several months and made some 200 purchases from Gulf distributors in several states, in the total amount of

2953.55. The holding of Adams is simply that the execution of he fraudulent scheme involved an extension of credit, which contemplated the utilization of a commercial practice including he use of the mails. The case cited as the precedent for this olding is United States v. Lowe, CA 7th, 1940, 115 F.2d 596, Cert. Den., 311 U.S. 717, 61 S.Ct. 441, 85 L.Ed. 466) which in-o'ved a check-kiting scheme and the direct dealing of the de-endant with two banks and the necessity of relying upon a delay n time for forwarding a deposited check until payment was re-ised by the bank on which the check was drawn to afford the de-endant an opportunity to use or exhaust a credit to his account f $4,000.00. That decision in turn goes to great length to dis-tinguish the case of Dyhre v. Hydspeth, 106 F.2d 286, on the ground hat case involved a scheme of inducing merchants to accept fraud-ulent checks for merchandise, and did not establish a scheme to et up a line of credit for future use.

The decision in Adams gives as an additional ground for its holding the proof of the allegation in the Indictment hat the intended victims of the fraud were not only Gulf distri-butors, but Gulf Oil Company itself and the rightful owner of the credit card, and the scheme contemplated forwarding of the sales slips by mail for ultimate payment by them. Finally, in Adams,

the court referred to the delay in detection afforded by the use of the mails which permitted the defendant to expand the scope of his operations and concluded: "Thus, when the scheme is viewed in its entirety, it is obvious that the use of the mails constituted a part of it."

Adams relies on Bauman v. United States, CA 5th, 1946, 156 F.2d 534, which also involved multiple transactions necessitating reliance upon the delay in discovery of the forgeries of the checks which would result from the use of the mails. In Bauman, the petitioner sought release on habeas corpus for failure of the Indictment (to which he had plead guilty) to charge a Federal offense, on the ground the Indictment showed on its face that the mailing of the check was after the completion of the fraudulent scheme. The court noted that no one count in the Indictment described a fraudulent scheme that began at a certain date and continued to a later date, but the Indictment did allege a series of transactions on different dates outlining a course of conduct that delay in discovery of the fraud, by reason of the use of the mails, would aid. The court pointed out that the Indictment alleged that the defendant intended to defraud the business organization whose name he had forged to the check, not merely the local hotel that had cashed the check. In the course of the opinion the Court reasoned that it was difficult to see how the defendant could have intended to defraud the concern against which he was forging checks unless the checks were trans-

ccount was kept. In Bauman, the court said:

" The defendant pleaded guilty to an indictment which alleged that he was intending to defraud the concern whose name he had forged to the check and not merely that he had intended to defraud the hotel that had cashed the check. He pleaded guilty to an indictment that said the mailing of the check was in and for executing the scheme and artifice. These allegations were not denied but were admitted, and we think that the Court had jurisdiction of the offense."

In Adams, the court said:

" The conviction must be affirmed for another reason. The Indictment alleged, and the evidence established, in our opinion, that appellant devised a scheme to defraud, not only the various Gulf distributors, but also the Gulf Oil Company and Magie. Appellant could not have intended to defraud either Gulf or Magie except by having the sales slips transmitted in the usual course by mail x x x."

In both Bauman and Adams, schemes embracing nny separate transactions, and requiring a delay in detection, were alleged in the Indictment. In Bauman the defendant plead guilty to this charge and the further charge that the mailings were in and for the execution of the scheme. In Adams the court said the

evidence established a scheme to defraud the oil company and the credit card owner.

Neither of these cases stands for the proposition that a bare allegation of intent to defraud an ultimate victim is sufficient to invoke federal criminal jurisdiction over a fraudulent scheme which is specifically restricted to a single transaction of obtaining merchandise by a fraud practiced on a local service station, calling neither for the use of credit over a period of time, or a delay in detection of the scheme to be occasioned by use of the mails.

The pole star in this matter is the language of the statute, (18 U.S.C., Sec. 1341), which requires that the use of the mails, on which fact federal jurisdiction is posited, be "for the purpose of executing such scheme or artifice or attempting so to do."

The defendants did not plead guilty here, and it was encumbent on the Government to both allege and prove use of the mails for the purpose of executing a fraudulent scheme. This is not accomplished by an allegation of a single local transaction."

The case of Kloian v. United States, CA 5th, 1965, 349 F.2d 291 does not support the argument of the Government either. In that case, also, the defendant had entered a guilty plea, and he brought an action for post-

conviction relief on the ground that the information did not charge an offense. The court noted that the question in these cases centers on whether the use of the mails is an integral and material part of the scheme as planned and executed, or whether the scheme was independent of the use of the mail. The court pointed out that the indictment alleged a scheme to defraud the oil company and credit card owner, as well as the distributors of the oil company products. To which, of course, the plea of guilty applied.) It further pointed out:

> " . . . In Adams, three separate purchases were charged in the execution of the scheme. Each allegedly caused the mailing of the purchase invoices to the oil company. Here two separate purchases with attendant mailings were charges. In Adams, the purchases were spread over a period of slightly more than a month. Here they were over a period of approximately two weeks."

The cases of Kann and Parr v. United States, 363, U.S. 370, 80 S.Ct. 1171, are clear examples that it is not every misuse of a commercial credit card which will establish a scheme which has the use of the mails as an integral and material part of the scheme as planned and executed. If it is obvious from the allegations in the Information that the scheme is complete before any use of the mails occurs, no federal offense is charged.

Moreover, if it is alleged that the ultimate victim was intended to be defrauded by a scheme which necessarily involved use of the mails, the charge must either be admitted by the defendant, or proved against him by the Government. There is neither admission nor proof in the instant case.

The only shred of testimony offered by the Government to show proof of such intention, or use, is the testimony of the witness Statham that Phillips Petroleum Company sustained a bad debt loss on the transaction. (Answer Brief, page 19). In this connection, the Government did not prove by this witness (or any other) where the responsibility of loss would normally fall. The record does show that on March 18, 1964, the witness Stratham was informed by a phone call from Mr. Smith, an F.B.I. agent in Kansas City, that the credit card was being misused. (T.R. Vol. 3, p. 127) This was known five full days before any use of the mails occurred on March 23, 1964, (T. R. Vol. 3, p. 115), so how can it possibly be said that the use of the mails was "an integral and material part of the scheme as planned and executed?"

In Kann it was pointed out that when the fraudulent checks were cashed at the local bank, the defendants received the moneys it was intended they should receive under the scheme. The local bank became the owner of the check, and was

entitled to collect from the drawee bank, and the drawer had no defense to payment. "The scheme in each case had reached fruition. The persons intended to receive the money had received it irrevocably. It was immaterial to them, or to any consummation of the scheme, how the bank which paid or credited the check would collect from the drawee bank. It cannot be said that the mailings in question were for the purpose of executing the scheme as the statute requires."

So it is in the instant case. Phillips Petroleum Company took the loss on the transaction after having notice of the fraud five full days before any use of the mails occurred. Either its liability for the loss was complete before any use of the mails occurred, or else it was a voluntary loser and a voluntary loss was certainly no part of the fraudulent scheme alleged.

The information showed, on its face, that no federal crime was stated, and the Appellants were put to trial in violation of the Tenth and Fourteenth Amendments to the United States Constitution. There was no proof at the trial that a federal offense was committed in the fraudulent use of the mails, and the defendants were wrongfully convicted.

POINT TWO

THERE IS NO SUBSTANTIAL EVIDENCE THAT THE DEFENDANTS USED THE MAILS OR KNOWINGLY CAUSED THE MAILS TO BE USED.

The Answer Brief acknowledges the contention of the Appellants that the mailing relied upon was actually caused by the F.B.I., for the purpose of prosecuting the defendants. (Answer Brief, page18).

The Government has not controverted the facts established by the record as to this matter, or disputed the correctness of the authorities relief upon by the Appellants in their Opening Brief.

The Government says, merely, that Appellants' contention is based upon the assumption that the scheme to defraud was completed before any use of the mails took place, that Phillips Petroleum Company was the victim of the fraudulent scheme, and that the natural and probable consequence of the acts of Appellants was the forwarding of the credit card slips to Phillips by mail, which the defendants are "presumed" to have intended.

The fatal flaw in this argument is that the act of mailing, either by a direct deposit of matter in the mails, or indirectly through a series of circumstances set in motion by the accused, is an element of the crime charged.

Where, as in this case, that mailing is actually accomplished by federal agents in order to make out a case for federal prosecution, or even by the person initially defrauded, having knowledge of the fraud before the mailing, the person so accused is not responsible directly or indirectly for such mailing.

This was the holding in United States v. Gardner, CA 7th, 1948, 171 F.2d 753. That case arose on indictments for causing a stolen motor vehicle and forged and counterfeited checks to be transported in interstate commerce. The proof was that on the day one Chenoweth took the spurious checks in exchange for the automobile, he was advised that he had been "hooked" and took the checks to the police department who telephoned the president of the bank on which the checks were purported to be drawn, and from whom was received the definite information that the checks were forged on spurious. Chenoweth learned on the day he took the checks that they were forgeries. The car he had turned over to the persons who had defrauded him was recovered three days later and returned to Chenoweth two days after its recovery. Then Chenoweth presented the checks to the Richmond bank two days after the car had been returned to him, and in due course they were forwarded for payment to the bank in Chicago. Chenoweth testified that he deposited the checks in the Richmond bank "for the purpose of making a case from the federal standpoint."

On this circumstance the court said:

". . . While we are referred to no case directly in point, we are of the view that the checks came to rest insofar as interstate commerce is concerned when Chenoweth learned that they were forgeries. It has been held that a stolen motor vehicle recovered before it crosses a state line will not support a charge for its transportation in interstate commerce, knowing it to have been stolen. Hill v. Sanford, 5 Cir., 131 F.2d 417, 418. And it has been held, 'The act does not purport to exercise jurisdiction over individuals who receive or sell stolen cars after such cars cease to move in or be a part of interstate commerce.' Davidson et al. v. United States, 8 Cir., 61 F.2d 250, 255. We think the instant situation is analogous and that the Act upon which this cause is predicated does not embrace the factual situation of the instant case.

The Government relies upon the recent case of United States v. Sheridan, 329 U.S. 379, 67 S.Ct. 332, 91 L.Ed, 359. That case is readily distinguishable. There, it was the defendant who took the forged checks to a bank and cashed them; he did so knowing that the bank would transport them in interstate commerce, and

from a reading of the opinion it may be presumed that the bank had no knowledge that a fraud was being perpetrated upon it. It was in connection with that situation that the court, 329 U.S. at page 391, 67 S.Ct. at page 338, made the statement upon which the government relies: 'One who induces another to do exactly what he intends, and does so by defrauding him, hardly can be held not to 'cause' what is so done.' Here, it was not the forger who induced Chenoweth to present the forged checks to the bank, and by no stretch of the imagination can it be said to have been the defendant Gardner. Many days before Chenoweth presented the checks to the Richmond bank the fraud on him had been perpetrated. We are strongly of the view that the Act does not contemplate that a person who has been knowingly defrauded in such manner may step into the shoes of the offender and cause the forged instruments to be placed in interstate commerce for any purpose, much less that 'of making a case from the federal standpoint."

The authority of the decision in Gardner has never been diminished or departed from in all of the cases referred to in Shepard's Citator. In most of them, the doctrine was not applicable because

there was proof only that the act of transporting the instruments in interstate commerce was done by one who merely suspected that the instrument was false or forged, but did not have knowledge of such fact. Typical of these decisions is the case of Nowlin v. United States, CA 10th, 1964, 328 F.2d 262. There the court said:

> " . . .To apply the rule of law laid down in United States v. Gardner, supra, the evidence must show that the bank had absolute 'knowledge' of the forgeries, and, with this knowledge mailed the forged checks through interstate commerce for payment in order to incriminate the appellant and his co-defendant. The Denver bank, however, had mere suspicions of the forgeries, which is not tantamount to knowledge. There is a wide disparity between 'suspicion' and 'knowledge'.

In the present case, the facts of the knowledge of the misuse of the credit card on the part of the local service station and the officials of Phillips Petroleum Company, together with the circumstances surrounding the mailing of the sales slips, described in full in the Opening Brief of Appellants, bring this case squarely under the doctrine of Gardner.

THERE WAS NO EVIDENCE OF SUBSTANCE TO CONNECT THE DEFENDANTS WITH THE PERPETRATION OF A FRAUDULENT SCHEME.

The following items are relied on by the Government to identify the appellants and connect them with the crime charged:

1. Identification of the defendant Cornet by the service station attendant, Anderson, who drove another passenger into the station, who produced a credit card and gave it to the attendant.

When this witness was asked if he recognized either of the defendants seated in the courtroom, the witness testified that he recognized one of them -- the defendant Cornet. He was then asked if he recognized the other one (defendant Windom) and the witness stated "I believe I recognize the other one, but I am not positive. (T. R., Vol. 3, p. 21) The Government took another stab at trying to establish the identity of the defendant Windom and asked this witness whether he was sure that Mr. Windom was one of the gentlemen who came into the station that night. The witness answered, "I wasn't sure, no sir." (T. R. Vo. 3, p. 37) This witness never gave any stronger testimony than this on the point. (T. R. Vol. 3, pp. 41-42; 51; 59; 62-63).

2. Another filling station attendant, Loveland, testified he had met the defendants at the station (T. R. Vol. 3, pp. 64-65). Despite the early certainty of this witness that he

ecognized both defendants, the course of his testimony in full howed him to falter so badly over most of the circumstances in- olved, that over the objection of the defendants, the Government as finally permitted to try to establish identity by reading into vidence the written account made by an agent of the F.B.I. following n interview with the witness shortly after the event. Even this as not sufficient to re-establish any credibility to the witness' estimony, as described at pages 47-49 of Appellant's Opening Brief.

3. The car had Oklahoma license plates bearing a ertain number which Anderson said he recorded on the credit card ales slip, but he did not record the year of the license plates. T. R. Vol. 3, page 58)

4. A witness appeared from Oklahoma who had had car like the car in question with an Oklahoma license plate aring the same number, issued in the year 1963. He testified traded the car in to "Rakin Brothers Used Car Lot." (T. R. Vol. 3, 134.) Thereafter this witness was continuously questioned about ney Brothers Used Car Lot" which he located in Phoenix, Arizona. T. R. Vol. 3, pp. 134-137) He testified he had seen the defendant ndom (whose name the witness could not recall) around the car t when he traded his car off; that he had worked at that car lot r a couple of weeks as a mechanic, and that the defendant Windom s "staying around there in the back of the garage, back there, nd of a real old house, part time." He never saw the license

plate on his car after he traded it in to the lot. (T. R. Vol. 3, 134-136) His automobile was a 1955 two-tone green Lincoln. (T. R. Vol. 3, pp 137-138) A license plate purchased in the early months of 1964, would not be identified as a 1963 plate (T.R. Vol. 3, p. 139) as new plates are purchased in Oklahoma every year. He did not know what the Defendant Windom was doing at the car lot -- he believed he was associated in some way with Mr. Raney. (T. R. Vol. 3, p. 140)

5. The testimony concerning the arrest of the defendant Windom at Raney's Used Car Lot in Phoenix, Arizona, was, in substance that there was a 1961 pink Lincoln sedan on the lot which had three new Phillips tires mounted on its wheels. It was never established that Windom had any connection with this Lincoln.

The Government rightfully characterizes this evidence as being partially direct and partially circumstantial. (Answer Brief, p. 8) The government's summation of the evidence relied on establishes that although the defendant Cornet was identified by both service station attendants, there was no proof whatever that he had knowledge of any fraudulent scheme or that he did anything more than serve as an inquirer for a man never certainly identified. There was testimony that before the event at the service station the defendant Windom was

at or near a car lot where there was a car with a 1963 Oklahoma license plate of the same number as that on the pink Lincoln, but the year of the license plate was never established. Three new Phillips tires were discovered on a pink Lincoln at the car lot, but the license plate was that of an Arizona Dealers License of a different number from that on the car in question. The defendant Windom is reported to have said he had at an earlier date traded the title to the pink Lincoln seen on the used car lot over to Mr. Raney before the defendant Windom's most recent trip to Las Vegas. There was no proof connecting the defendant Windom to the ownership of the pink Lincoln at the car lot, or at the filling station. The tires on the car in the lot were like those obtained at the service station, but although they had serial numbers, no positive identification was made, and the failure to make it was not explained by the Government.

This proof is simply not sufficient to identify the defendants and connect them with the commission of the acts c charged against them.

It was rightly said in the case of United States v. Wapnick, D. C. E.D. NY. 1962, 202 F. Supp. 712, that "'substantial evidence' means more than a synthesis of a chain of inferences from equivocal facts," and the evidence in that case did not

meet the test for proof of criminal guilt. Nosowitz v. United States, 2 Cir., 1922, 282 F. 575; United States v. Gardner, 7 Cir., 1948, 171 F.2d 753.

The test referred to is whether viewing the evidence in the light most favorable to the Government, there is substantial evidence to establish the defendant's guilt. The decision notes that this test is less stringent than that employed in the Ninth Circuit (Elwert v. United States, CA 9th, 1956, 231 F.2d 928, 933) where in passing on a motion for acquittal the judge determines whether or not, viewing the evidence and inferences fairly flowing therefrom in the light most favorable to the Government, a reasonable mind might fairly conclude the defendant was guilty beyond a reasonable doubt.

See also:

United States v. Gardner (supra) CA 7th, 1948, 171 F. 2d 753, where a purported identification of the defendant, and an effort to connect him with the commission of a crime are strikingly similar to the present case, and where it was held there was not sufficient evidence to sustain the verdict.

Compare the circumstances with those in State v. Seal, N.M., 1965, 209 Pac. 2d. 128, where it was held that a similarity of footprints, tire prints, the locations of the defendant and his actions and statements created a suspicion

hat he committed the offense charged, but did not constitute ubstantial evidence to support the conviction.

See also: Karn v. United States, CA 9th, 1946, 58 F.2d 568

POINT FOUR

BY REASON OF THE MISCONDUCT OF THE UNITED STATES ATTORNEY IN THE MAKING OF HIS CLOSING ARGUMENT TO THE JURY, THE COURT'S REFUSAL TO DECLARE A MISTRIAL, AND THE REFUSAL OF THE LOWER COURT TO INSTRUCT THE JURY IN ACCORDANCE WITH DEFENDANT'S REQUESTED INSTRUCTION NO.8 DEFENDANTS ARE ENTITLED TO A NEW TRIAL.

The government's answer brief admits tiat there was no evidence of record to support the argument o: the prosecution concerning (a) the assertion that the Governnnt's handwriting expert could not identify the defendant Windom a the person who wrote the signature "J. Box" on the credit card sles slip because only four letters appeared in the signature ad this did not afford an adequate basis for comparative analysis; ad (b) the assertion that no fingerprint analysis could have been nde of the service station's copy of the credit card sales slip ocause the customer got the original ticket and the fingerprints vuld not show up on the carbon copy.

The government asserts that it can discover no authority which would forbid argument (a) concerning the failure of defense counsel to introduce in evidence exhibits consisting of specimens of handwriting taken from the government witnesses, Anderson and Loveland, the service station attendants, during their cross-examination; and (b) argument concerning the defendants' failure to subpoena a government witness or an F.B.I. agent to prove what the serial numbers on the tires were which were taken from the Lincoln on the Used Car Lot in Phoenix, Arizona.

Finally, the government argues that inasmuch as the argument of the prosecution that the "government honestly believes the defendants are guilty and deserve to be punished" is not objectionable, because it did not convey to the jurors an impression that the belief of the Government was based on any evidence outside the record.

The following authorities are pertinent and controlling:

Taliaferro v. United States, CA 9th, 1931, 47 F. 2d 699 --

> "Counsel are allowed great latitude in making argument, but they should refrain from making statements of fact based solely on knowledge. Prosecuting attorneys occupy a very high and responsible position.

It is their duty, of course, to represent the government and to present the government's contentions, but it is equally their duty to see that one accused of crime is not prejudiced by the offer or introduction of incompetent evidence or by statements in argument that are not justified by the facts proved. 'Conviction must be, if at all, on the evidence given, not on what might have been given.'"

Lowdon v. United States, CA 5th, 149 F. 673 -- "Cases are to be decided by juries upon the evidence and when the evidence is offered by witnesses, the witnesses are subject to cross-examination. A defendant should not be subjected to a trial on the unsworn statements of an attorney conducting the prosecution, even when such statements are relevant to the case, for he would by this procedure be debarred the right of cross-examination and be also deprived of the right of offering evidence in rebuttal. It is not within the legitimate province of counsel to state facts pertinent to the issue that are not in evidence; nor can he assume in argument that such facts are in the case when they are not."

Moyer v. United States, CA 9th, 1935, 78 F.2d 624 --

" Where, as in this case, the only witness available who was not called was equally accessible to both the prosecution and the defendant on trial, the rule is that no unfavorable inference can be drawn against either the prosecution or the defense by reason of a failure to call such witness. Egan v. United States, 52 App. D. C. 384, 287 F. 958, 969; Grunberg v. United States (CCA) 145 F. 81, 88; 16 C.J. 541; Sacramento Suburban Fruit Lands Co. v. Boucher (CCA) 36 F.2d 912."

United States v. Toscano, CA 2d, 1948, 166 F.2d 524 --

"In prosecution for unlawfully possessing heroin and morphine sulphate, summation of government's counsel that package which contained the narcotics might show defendant's fingerprints was improper, even though provoked by references by defendant's counsel to facts outside record, where government introduced no evidence to show any fingerprints, and error was not eliminated by judge's statement that jury was to decide case only on the evidence." (Syl. No. 5)

Johnson v. United States, C.A., D.C., 1965, 347 F.2d 803 --

"Ordinarily counsel has the right to comment on any matter brought to the attention of the jury. Closing arguments may also focus on the failure of defense witnesses to explain certain incriminating circumstances, or the opposing party's failure to call as witnesses persons peculiarly within his control. It is elementary, however, that counsel may not premise arguments on evidence which has not been admitted. Here the evidence on which the prosecutor predicated his argument to the jury, even if formally tendered to the court, could not have been admitted over objection."

"It is a well known rule of evidence, applicable in criminal and civil cases alike, that prior consistent statements may not be used to support one's own unimpeached witness. . ."

Wagner v. United States, C.A. 5th, 1959, 23 F.2d 877 --

" Defendant's case should not be prejudiced by criticizing their counsel for making reasonable objections to the introduction of testimony. Further, this criticism had a tendency to prejudice the defendants if their counsel should object to parts of the oral argument as improper. . . .

The Government had to rely on the evidence which

it introduced, and could not properly ask the jury to assume that there was more damaging evidence against the defendants which would have been brought to light if defendants' counsel had cross-examined Evelyn Smith more extensively. . . .

This was a wholly impermissible argument not based on the evidence and one that reflected on the sincerity of counsel for both defendants."

United States v. Molin, 244 F. Supp, 1015 --

A defendant has no duty to aid in the presentation of the case.

Greenberg v. United States, CA 1st, 1960, 280 F. 2d 472 --

". . . To permit counsel to express his personal belief in the testimony (even if not phrased so as to suggest knowledge of additional evidence not known to the jury), would afford him a privilege not even accorded to witnesses under oath and subject to cross-examination. Worse, it creates the false issue of the reliability and credibility of counsel. This is peculiarly unfortunate if one of them had the advantage of official backing. The resolution of questions of credibility of testimony is for impartial jurors and judges. The fact that government counsel is, as he says, an advocate

is the very reason why he should not impinge upon this quasi-judicial function. We believe the canon (Rule 15 of the Canons of Professional Ethics of the American Bar Association) to be elemental and fundamental. See also 1 Bishop, New Criminal Procedure, Sec. 293 (2d ed. 1913; 6 Wigmore, Evidence Sec. 1806 (3d ed. 1940).

It is true that special circumstances such as a personal attack upon counsel may occasionally justify a reply . . . (citing cases) Too much has sometimes been read into these cases due in part, perhaps, to language in some of the opinions. To the extent that cases may be found that permit counsel to state their personal belief as a matter of course, we do not follow them. We agree with the statement that 'No one who is at all conversant with jury trials can fail to see the possible prejudice. . . .' State v. Gunderson, 1913, 26 N.D. 294, 297, 144 N.W. 659, 660."

CONCLUSION

Based on the serious prejudicial error, it is respectfully submitted that the conviction of the defendants must be reversed and the case dismissed, or in the alternative, that

STIPULATION AND PROOF OF SERVICE

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IT IS HEREBY STIPULATED by and between counsel for the parties hereto that three copies of the Appellants' Reply Brief have been received by the undersigned Attorney for the United States, and that he expressly waives objection to the filing of the foregoing Brief in the said court after the date of May 2, 1966, and stipulates that the same may be timely filed upon receipt thereof by the clerk of the said Court.

Harry E. Claiborne

HARRY E. CLAIBORNE
and
ANNETTE R. QUINTANA
Attorneys for Appellants

Joseph L. Ward

JOSEPH L. WARD, United States Attorney